

1600 Broadway, Suite 300
Oakland, CA 94612
t. 510.452-9261
f. 510.452-9266

www.savesfbay.org

Copies sent to: PW file
Date: 6/22

June 21, 1999

Patricia Beneke, Assistant Secretary
Department of the Interior
1849 C Street, NW
Washington, DC 20240

Mary Nichols, Secretary
Resources Agency
1416 Ninth Street
Sacramento, CA 95814

Re: **Delta Smelt and Water Project Operations**

Dear Assistant Secretary Beneke and Secretary Nichols:

We have learned that water users were invited to meet with the CALFED Policy Group last week to present their views regarding water project impacts on the Delta smelt this year. Save The Bay and others in the Environmental Water Caucus are gravely concerned and disappointed with this procedure. It is very unfortunate that the Policy Group did not provide an opportunity for environmental representatives to be heard at the same time, particularly as agencies are considering taking immediate action on this issue. This inequity can only foster misunderstanding and poor communication and does not provide a sound basis for policy making.

We write today to provide you with our perspective on water project operations in the Delta this spring and the impacts that they are having on Delta smelt. We strongly urge you not to take any action that could further imperil the smelt, in violation of the Endangered Species Act, and request an opportunity to meet with CALFED policy group members before any such action is contemplated.

Our four critical points are: (1) The water projects are now violating the federal ESA; (2) the conflict the water users complain of is overstated, avoidable and almost entirely mitigatable; (3) The Bay-Delta Accord does not require the federal government to compensate water users for complying with the law; and (4) these conflicts between listed species and the water projects have been exacerbated by limited CVPIA implementation. These issues are addressed in detail below.

SAVE THE BAY

1. The State and Federal Water Projects are Currently in Violation of the Endangered Species Act. During May, the combined take of the projects was nearly 60,000 smelt -- six times the ESA "red light" limit of 9,700. The "red light" level for June is 10,709. As of June 18, the projects have killed over 32,000. Thus, over the past 7 weeks, the projects have killed over 92,000 smelt, compared to a take limit of 20,400. These levels constitute a dramatic violation of ESA requirements.

Water users have criticized the Fish and Wildlife Service for not demonstrating "flexibility" in meeting ESA requirements in a "post-Accord world". This is absurd and unfair. In fact, the Service -- and the environmental community -- have demonstrated tremendous flexibility, as indicated by the take levels over the past two months. But this flexibility has come at the expense of the smelt and ESA enforcement. The environmental community has shown significant restraint in delaying legal action, action in which they are highly likely to prevail, in hopes that a solution could be found. However, given the extraordinarily high numbers of smelt taken to date, and the fact that that take is ongoing, the environmental community may be approaching the limits of flexibility as, we anticipate, the agencies responsible for ESA enforcement are as well.

2. The Current Conflict is Overstated, Predictable and Avoidable. The current operations in no way present the "crisis" that the water users are claiming. To the contrary, as of June 18, the Bureau indicated to us that CVP water allocations for the year are unchanged. The State Water Project has likewise indicated that SWP allocations remain unchanged. Moreover, water deliveries that are being affected by smelt protections include groundwater recharge by the Metropolitan Water District for future years. Certainly groundwater banking is important, but its delay hardly constitutes a crisis worthy of violating a federal statute. In addition, not only has the Westlands Water District been purchasing water on the market, but also other water agencies, such as in Kern County, have offered additional water for sale. In sum, it is simply not true that protections for an endangered native fish spell the ruin of Central Valley agriculture this summer.

To the extent that the smelt issue constitutes a "crisis", it is one largely of the contractors own making. Every spring for the past several years, the water projects have struggled with actions needed to protect the Delta smelt. The San Luis "low point" issue (i.e. temporarily exhausting SWP and/or CVP water stored in the San Luis reservoir) is also not new. It has been experienced several times in the past few years. Each time, water users have demonstrated the ability to find solutions without violating the Endangered Species Act. And every year, the environmental community has urged water users to prepare for future smelt conflicts by bringing on line tools to provide added flexibility. These tools include, but are not limited to, improved groundwater management, rescheduling water deliveries, land fallowing, water purchases and other options. Unfortunately, water users and the water projects have not availed themselves of these options. Rather than emphasizing preparation, water users have waited for conflicts with the smelt to emerge and worked to weaken enforcement of the ESA. Frankly, to date, that strategy has proven effective for them. Over the long-term, however, such brinkmanship undermines the ecosystem and water supply reliability.

3. The Bay-Delta Accord Does Not Require the Federal Government To Pay Water Users To Comply With the ESA. In the five years since its signing, water users have claimed that the Accord includes several requirements that are simply not in the document. The simple fact is that this document says nothing about purchasing water for the protection of species listed at the time of the Accord, such as the Delta smelt. The Accord represented the hope of its signatories that the standards embodied in it -- in addition to the environmental baseline already existing -- would avoid the need for future ESA listings. To that end, the Accord provided that for three years, the agencies would maximize flexibility in the system to protect water supplies "consistent with the Federal and State Endangered Species Act." It is a gross distortion of that document to suggest that it promised that the federal government would abandon the ESA for already listed species and apply it only to the extent that water users were fully compensated from the federal treasury. This assertion is all the more specious in light of the fact that the CVPIA, which serves as the foundation for the Accord, has never been fully implemented.

4. The Lack of CVPIA Implementation Has Increased Conflicts in the Delta. The CVPIA mandated a pro-active ecosystem restoration program that would reduce future ESA conflicts. The Act did so by recognizing that such conflicts can be avoided only through a combination of affirmative ecological restoration (using both water and the Restoration Fund) and fundamental change in the way the CVP is operated in order to accommodate the natural systems in which the project exists. Unfortunately, many the reforms of the CVPIA, particularly section 3406(b)(2), have never been fully implemented. It is not, therefore, particularly surprising that conflicts between project operations and endangered fish species such as the smelt are continuing unabated. Without a commitment to CVPIA implementation, further conflicts are all but inevitable.

In particular, it is worth noting that federal and state water users have actively obstructed implementation of the CVPIA in ways that could have benefited the smelt this spring. As a result of the legal efforts of the San Luis-Delta Mendota Water Association, supported by state water users, most of the pumping restrictions in Delta Action 1 (required by Interior's November 1997 final decision), were not implemented. These restrictions would have benefited San Joaquin River salmon, as well as Delta smelt. During this time, at least 20,000 acre-feet of (b)(2) water were pumped into San Luis Reservoir. Interior is currently under a court order to dedicate "no more and no less" than 800,000 acre-feet this year to fish and wildlife restoration. We have previously requested that Interior develop a plan to use this stored water for fisheries protection.

We believe that full implementation of the CVPIA, as well as an ambitious CALFED ecosystem restoration program, could provide the pro-active efforts needed to reduce ESA conflicts. We urge you to support such progressive measures, rather than to weaken further already lax ESA enforcement.

We look forward to discussing these matters with you as soon as possible.

Sincerely,

Barry Nelson
Senior Fellow

cc: Senator Dianne Feinstein

Senator Barbara Boxer
Congressman George Miller
Senator John Burton
Senator Byron Sher
Senator Tom Hayden
Don Berry
Steve Richardson
Kirk Rogers
Mike Spear
Tom Hannigan

H - 0 0 1 6 0 4

H-001604